

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Bob Fine,

Complainant,

vs.

ORDER ON
ADDITIONAL PENALTY

Jim Bernstein,

Respondent.

The above-entitled matter came before the panel of Administrative Law Judges on January 23, 2006, on the parties' written submissions on the issue of additional penalty. The record closed on that date.

Bob Fine ("Complainant"), 3932 York Avenue South, Minneapolis, MN 55410, represented himself without counsel.

Alan Weinblatt and Luke Kuhl, Weinblatt & Gaylord, PLC, 111 East Kellogg Boulevard, St. Paul, MN 55101, represented Jim Bernstein ("Respondent").

Based upon all of the files, records, and proceedings herein, and for the reasons set out in the attached Memorandum,

IT IS ORDERED:

That no additional penalty be assessed against Respondent.

Dated: January 25, 2006

/s/ Beverly Jones Heydinger
BEVERLY JONES HEYDINGER
Presiding Administrative Law Judge

/s/ Barbara L. Neilson
BARBARA L. NEILSON
Administrative Law Judge

/s/ Kathleen D. Sheehy
KATHLEEN D. SHEEHY
Administrative Law Judge

NOTICE

Under Minn. Stat. § 211B.36, subd. 5 this order is the final decision in this matter and a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. § § 14.63 to 14.69.

MEMORANDUM

The Complainant is currently the Minneapolis Park & Recreation Board Commissioner representing District 6. On October 12, 2005, he filed a campaign complaint alleging that his opponent (Respondent) had violated Minn. Stat. §§ 211B.04 and 211B.06. After a hearing, a panel of three Administrative Law Judges found that the Respondent did violate Minn. Stat. § 211B.06 with respect to certain campaign material and by Order dated November 7, 2005, assessed a civil penalty against the Respondent in the amount of \$800.¹

On November 14, 2005, the Complainant filed a second campaign complaint against the Respondent alleging additional violations of Minn. Stat. § 211B.06. On November 16, 2005, Administrative Law Judge Beverly Jones Heydinger concluded that the complaint alleged prima facie violations of Minn. Stat. § 211B.06 with respect to five statements identified in Exhibits A, B and C, which are identical or nearly identical to statements found to have violated Minn. Stat. § 211B.06 by the prior panel in its November 7, 2005, Order. Administrative Law Judge Heydinger concluded further that since there had already been a ruling that Respondent violated Minn. Stat. § 211B.06 by preparing and disseminating campaign material that contained these statements, the only issue for the panel to consider with respect to these statements was whether their wider distribution warranted an additional penalty.

Administrative Law Judge Heydinger also found that the complaint alleged prima facie violations of Minn. Stat. § 211B.06 with respect to two other statements in campaign material Respondent disseminated prior to the election. However, on January 9, 2006, the panel of Administrative Law Judges granted Respondent's motion for partial summary disposition and dismissed these new allegations. Accordingly, the only issue remaining for the Panel is what, if any, additional penalty should be assessed against the Respondent for his additional dissemination of the statements found to have violated Minn. Stat. § 211B.06 in the November 7, 2005, Order in *Fine v. Bernstein*, OAH Docket No. 12-6326-16910.

In its November 7, 2005, decision, the prior panel assessed an \$800 civil penalty against Respondent for preparing and disseminating a campaign flyer in early October of 2005, that contained three statements the panel found were false and Respondent knew were false or communicated with reckless disregard

¹ *Fine v. Bernstein*, OAH File No. 12-6326-16910-CV (November 7, 2005, Findings, Conclusions and Order). (The panel found the Respondent violated Minn. Stat. § 211B.06 with respect to three statements related to the Lake of the Isles restoration project, an alleged Superintendent slush fund, and funding for speedy removal of trees infected with Dutch Elm disease.)

as to whether they were false. In this case, the Respondent disseminated the same three statements or nearly identical statements in campaign advertisements that appeared in the October 24 and November 7, 2005, editions of the *Southwest Journal*, and in a campaign flyer that was distributed in the Park Board District 6 area on or about November 5, 2005.

The Complainant argues that Respondent should be assessed an additional penalty for continuing to disseminate the false statements after the first complaint was filed on October 12, 2005, and after Administrative Law Judge Mihalchick issued his prima facie determination and probable cause orders on October 14 and 20, 2005. Complainant maintains that the preliminary orders by ALJ Mihalchick put the Respondent on notice that the statements were disseminated in violation of Minn. Stat. § 211B.06. The Complainant asserts that the Panel should assess a penalty of at least \$1600 to deter the type of disregard that Respondent has shown for the prior Orders.

Respondent argues that no additional penalty is warranted because the Complainant did not sustain any additional damage. Respondent asserts that the Complainant had ample time to rebut Respondent's claims before the election and points out that the Complainant in fact won the election. In addition, the Respondent maintains that his decision to continue to publish the statements after ALJ Mihalchick's October 14th prima facie determination and October 20th probable cause order was not reckless because these were simply preliminary decisions based on a standard much lower than the "clear and convincing" standard complainants are required to meet at the final stage of the process. Respondent points out that he ceased publishing the statements once the panel issued its final decision on November 7, 2005.

After careful consideration of the parties' written submissions, the Panel concludes that no additional penalty is warranted in this matter. Respondent's additional dissemination of the three false statements occurred prior to the panel's final decision in the first *Fine v. Bernstein* matter, and targeted the same audience (readers of the *Southwest Journal* and residents of Park Board District 6). It is unlikely that the republishing of the statements reached considerably more voters or had a greater impact on those voters. Complainant did, after all, win the election. In addition, the \$800 penalty previously assessed was based in part on the fact that there were multiple violations. The panel sees no basis for adding to the penalty.

B.J.H., B.L.N., K.D.S.